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Chin Chee Kow (as secretary to Persatuan Kebajikan dan Amal Liam Hood Thong Chor Seng Thuan) v Peguam Negara Malaysia

B

HIGH COURT (PULAU PINANG) — APPLICATION FOR JUDICIAL REVIEW NO PA-25–17–04 OF 2016
AZMI ABDULLAH JC
16 DECEMBER 2016

C

Civil Procedure — Judicial review — Application for leave — Whether test for leave for judicial review satisfied — Whether application frivolous and vexatious — Whether preliminary objection that decision of Attorny General on consent under s 9 of the Government Proceedings Act 1956 non-justiciable issue — Government Proceedings Act 1956 s 9 — Rules of Court 2012 O 53

D

Chan Leong Kean, the testator, had executed a will and codicil along with a trust deed dated 6 May 1941 bequeathing four pieces of land and RM15,000 for construction of a Pagoda and RM5,000 to be invested and the income from it to be used to maintain the Pagoda. Since the death of the testator, the initial trustees failed to carry out the trust and the sums of money had been used up completely. On 20 August 1982 the High Court handed down an order declaring the said land to be a public charitable trust and the principles of the cy-pres doctrine applied. After a 35-year lapse, there had been no efforts by the trustees to carry out the wishes of the testator by way of cy-pres and the said lands were left vacant. The association endeavoured to secure funding from third parties to build the Pagoda. However, as precondition to the funding the association needed to be appointed as trustee, to provide legal standing to execute agreements on behalf of the said trust. Hence, via letters dated 20 November 2014 and 6 July 2015 the association applied to the Malaysian Attorney General ('the AG') for consent under s 9 of the Government Proceedings Act 1956 ('the GPA'), to make an application to the High Court to be made a trustee in addition or to replace the current trustee. Via a letter dated 17 February 2016, the AG refused to give his consent on the grounds that the consent had been previously given to the current trustees on 15 March 2014. Aggrieved by the decision of the AG, the association applied to the court for leave to commence judicial review and for orders of certiorari and mandamus. The senior federal counsel ('SFC'), among others, submitted as a preliminary objection that the decision of the AG on consent under s 9 of the GPA was a non-justiciable issue.

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Held, granting order for encl 1 with further case management to be pursued before the senior assistant registrar:

(1) The respondent's basis of objecting to the application by arguing as a preliminary objection that the applicant had not obtained consent from the respondent under s 9 of the GPA was perplexing as the leave for judicial review was against the very decision of the respondent in refusing consent. It was a misconceived and circular argument. Further, the respondents lack of action to file an affidavit opposing the leave application unfavourable to the respondent's position (see paras 15–17).

(2) The preliminary objection that the decision of the AG on consent under s 9 of the GPA was a non-justiciable issue, therefore the SFC's rigid reliance on the English Law to be ill conceived. The court also concurred with the Court of Appeal in *Teh Guat Hong v Perbadanan Tabung Pendidikan Tinggi Nasional*, that had distinguished our stance on the issue of non-justiciable and rigid reliance on this issue on English law would be misconceived. The court found that the test for leave for judicial review had been satisfied (see paras 25, 28 & 31).

(3) The leave stage was not the rightful stage to have the merits of the issues to be determined and exhaustive arguments considered. The leave stage was merely to sieve out frivolous applications before proceeding with the substantive stage of the proceedings. The submission by the SFC that 'the decision of the AG belongs to the AG' was untenable. The absolute discretion of the respondent (if at all it existed) was only pertaining to criminal offence whereas the case at present involved the discretion or authority of the respondent in a non-prosecutorial role. Hence, it should not involve an unfettered discretion (see paras 18–20).

(4) The use of the phrase 'any person' under O 53 r 2(4) of the Rules of Court 2012 was limited not just to individuals but also to a class of persons. The members of the association were the class of persons adversely affected by the refusal of the respondent to give consent in this instance. The affidavit in support of the application (encl 3) which was not accorded in the affidavit in reply by the respondent to counter the averments made, had disclosed sufficient grounds for the merits of the application to be heard. Thus, that the test for leave for judicial review in this case had been settled. The application was not frivolous and the applicant had an arguable case. Therefore, the threshold for leave to be granted had been satisfied (see paras 23–24 & 32).

[Bahasa Malaysia summary

Chan Leong Kean, pewasiat, telah melaksanakan wasiat dan kodisil bersama dengan surat ikatan amanah bertarikh 6 Mei 1941 mewasiatkan empat bidang tanah dan RM15,000 untuk pembinaan Pagoda dan RM5,000 untuk dilaburkan dan pendapatan daripadanya digunakan untuk menanggung Pagoda. Semenjak kematian pewasiat, pemegang-pemegang amanah yang pertama gagal untuk menjalankan amanah tersebut dan jumlah wang telah

digunakan kesemuanya. Pada 20 Ogos 1982 Mahkamah Tingggi memutuskan perintah mengisytiharkan tanah tersebut sebagai amanah kebajikan awam dan prinsip-prinsip doktrin cy-pres diguna pakai. Selepas luput 35 tahun, tidak terdapat usaha oleh pemegang-pemegang amanah untuk menjalankan hasrat pewasiat melalui cy-pres dan tanah tersebut ditinggalkan kosong. Persatuan tersebut berusaha untuk mendapatkan pembiayaan daripada pihak ketiga untuk membina Pagoda tersebut. Walau bagaiamanpun, sebagai prasyarat kepada pembiayaan persatuan tersebut diperlukan dilantik sebagai pemegang amanah, untuk memberikan taraf melaksanakan perjanjian-perjanjian bagi pihak amanah tersebut. Maka, melalui surat bertarikh 20 November 2014 dan 6 Julai 2015 persatuan tersebut memohon kepada Peguam Negara Malaysia ('PN') untuk izin di bawah Akta Prosiding Kerajaan 1956 ('APK'), untuk membuat permohonan kepada Mahkamah Tinggi untuk dijadikan pemegang amanah atau untuk menggantikan pemegang amanah semasa. Melalui surat bertarikh 17 Februari 2016, PN enggan memberikan izinnya atas alasan bahawa izin yang telah sebelum ini diberikan kepada pemegang amanah pada 15 Mac 2014. Tidak berpuas hati dengan keputusan PN, persatuan memohon kepada mahkamah untuk izin memulakan semakan kehakiman dan untuk perintah-perintah certiorari dan mandamus. Peguam kanan persekutuan ('PKP'), antara lain, berhujah sebagai bantahan awalan bahawa keputusan PN tersebut atas izin di bawah s 9 APK adalah isu tidak boleh diadili.

Diputuskan, membenarkan perintah untuk lampiran 1 dengan pengurusan kes selanjutnya dibawa di hadapan timbalan pendaftar kanan:

(1) Asas bantahan responden kepada permohonan tersebut dengan berhujah sebagai bantahan awalan pemohon tidak memperolehi izin daripada responden di bawah s 9 APK adalah membingungkan kerana izin untuk semakan kehakiman adalah terhadap keputusan responden dalam menolak izin. Ia adalah hujahan yang salah dan bolak-balik. Selanjutnya, kekurangan tindakan responden-responden untuk memfailkan afidavit menentang permohonan izin tersebut tidak memuaskan kepada kedudukan responden (lihat perenggan 15–17).

(2) Bantahan awalan bahawa keputusan PN atas izin di bawah s 9 APK adalah isu tidak boleh diadili, oleh itu, penggantungan tegar PKP ke atas undang-undang adalah pertimbangan yang tidak betul. Mahkamah juga bersetuju dengan Mahkamah Rayuan dalam kes *Teh Guat Hong v Perbadanan Tabung Pendidikan Tinggi Nasional*, yang telah membezakan pendirian mahkamah atas isu tidak boleh diadili dan penggantungan tegar, atas isu ini atas undang-undang English akan menjadi salah tanggap. Mahkamah mendapati bahawa ujian untuk izin bagi semakan kehakiman telah dipenuhi (lihat perenggan 25, 28 & 31).

(3) Peringkat izin bukan peringkat yang betul untuk mempunyai merit isu-isu ditentukan dan hujahan lengkap dipertimbangkan. Peringkat izin

hanya untuk menapis permohonan-permohonan yang remeh sebelum meneruskan dengan peringkat substantif prosiding. Hujahan PKP bahawa 'the decision of the AG belongs to the AG' adalah tidak dapat dipertahankan. Budi bicara mutlak responden (sekiranya ia wujud) hanya berkaitan dengan kesalahan jenayah sementara kes ini melibatkan budi bicara atau kuasa responden di dalam peranan bukan pendakwaan. Maka, ia tidak patut melibatkan budi bicara yang tidak terkawal (lihat perenggan 18–20).

(4) Penggunaan frasa 'any person' di bawah A 53 k 2(4) Kaedah-Kaedah Mahkamah 2012 tidak terhad hanya kepada individu-individu tetapi juga kepada golongan orang-orang. Ahli-ahli persatuan adalah golongan orang-orang yang terjejas secara teruk oleh penolakan responden untuk memberi izin dalam kes ini. Afidavit yang menyokong permohonan (lampiran 3) yang mana tidak diberikan di dalam afidavit jawapan oleh responden untuk menjawab hujahan yang dibuat, telah mendedahkan alasan yang mencukupi untuk merit permohonan didengar. Oleh itu, ujian untuk izin bagi semakan kehakiman dalam kes ini telah diselesaikan. Permohonan tidak remeh dan pemohon mempunyai kes yang boleh dihujahkan. Oleh itu, ambang untuk izin dibenarkan telah dipenuhi (lihat perenggan 23–24 & 32).]

Notes

For cases on application for leave, see 2(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 5950–5953.

Cases referred to

Gouriet v Union of Post Office Workers and others [1978] AC 435, HL (refd)
Jerry WA Dusing @ Jerry W Patel & Anor v Menteri Keselamatan Dalam Negeri Malaysia & Anor [2015] 1 MLJ 675; [2014] 9 CLJ 321, CA (refd)
Tang Kwor Ham & Ors v Pengurusan Danaharta Nasional Bhd & Ors [2006] 5 MLJ 60; [2006] 1 CLJ 927 (refd)
Teh Guat Hong v Perbadanan Tabung Pendidikan Tinggi Nasional [2015] MLJU 213; [2015] MLJU 2268, CA (folld)

Legislation referred to

Federal Constitution art 145(3)
Government Proceedings Act 1956 s 9, 9(2)
Rules of Court 2012 O 53 rr 2(4) , 3(1)
Societies Act 1966 s 7

Ravi Chandran (SC Ravi & Assoc) for the applicant.
Rosli bin Ahmad (Senior Federal Counsel, Attorney General's Chambers) for the first respondent.

Azmi Abdullah JC:

INTRODUCTION

[1] This is an applicant for leave for judicial review under O 53 r 3(1) of the Rules of Court 2012. The review being sought for is against the decision of the respondent in refusing consent under s 9 of the Government Proceedings Act 1956 ('the GPA'), a prerequisite before any proceedings in court can be initiated for any of the matters listed under s 9(2) of the GPA.

[2] The applicant brings this action in his capacity as the secretary of the Public Charitable Trust Liam Hood Thong Chor Seng Thuan. The respondent objected to the leave application but on 28 September 2016 this court allowed leave to be granted to the applicant hence this appeal.

BACKGROUND FACTS

[3] Cheah Leong Kean, deceased ('the testator') had executed a will and codicil dated 6 May 1941 and a trust deed dated 6 May 1941 wherein the testator had bequeathed the four pieces of land listed below and cash to the amount of RM15,000 for the construction of a pagoda on the lands and a further amount of RM5,000 to be invested and the income arising from such investments to be used to maintain the pagoda for the benefit of all devotees professing the Buddhist faith and conducting Buddhist religious customs of the deity Liam Hood Tong Chor Seng Tuan.

[4] The lands referred to in the will of the testator are as follows:

(a) Geran No 20348 Lot 491;

(b) Geran No 20349 Lot 492;

(c) Geran No 20349 Lot 292; and

(d) Geran No 20273 Lot 963

all situated in Section 1, North East District in State of Penang ('the said land').

[5] Since the death of the testator the initial trustees had failed to carry out the building of the pagoda as per the terms of the trust and the sums of money had been used up completely. On 20 August 1982 an order declaring the said land to be a public charitable trust was handed down by His Lordship Judicial Commissioner Mustapha bin Hussain (as His Lordship was then) and that the principles of the cy-pres doctrine be applicable.

[6] Since that order the said lands have been vested in the names of Robert Teng Lye Hock (deceased), So Miau Song, Tai Chong, Yeow Teow Giap (deceased) and Tan Siew Joo.

[7] In the 35 years that has lapsed since the said order, there has been no effort by the trustees to carry out the wishes of the testator or by way of cy-pres and the said lands have been left vacant.

[8] The said association comprises of the followers of the Buddhist faith and devotees of the said deity. The association frequently has religious functions and prayers to the said deity. There is currently no place of worship for the deity and the association carries out these prayers and other religious and charitable functions at makeshift premises.

[9] The association had endeavoured to secure funding from third parties to build the said pagoda. However as a precondition of the said promised funding, the association needs to be appointed as a trustee, to provide it with the necessary legal standing to execute agreements on behalf of the said trust.

[10] In view of the above the association had vide letters dated 20 November 2014 and 6 July 2015 applied to the Honourable Attorney General of Malaysia ('the AG') for consent under s 9 of the Government Proceedings Act 1956 so that an application can be made to the High Court for the association to be made a trustee in addition to or to replace the current trustees.

[11] The AG vide a letter dated 17 February 2016 had refused to give his consent on the grounds that consent had been previously given to the current trustees on 15 March 2014. Aggrieved by decision of the AG, the association now applies to this court for leave to commence judicial review of the said decision and for orders of certiorari and mandamus as prayed in this application.

THE TEST FOR LEAVE APPLICATIONS

[12] The case of *Jerry WA Dusing @ Jerry W Patel & Anor v Menteri Keselamatan Dalam Negeri Malaysia & Anor* [2015] 1 MLJ 675; [2014] 9 CLJ 321 succintly laid down the principle as follows pertaining to leave for judicial review:

> This appeal was in respect of an application for leave for judicial review where the threshold was very low. It was not necessary to go into the merits of the case at the leave stage. The test was to see whether the appellants had an arguable case and that the application was not frivolous. The appellants had passed the threshold for leave to be granted.

[13] In *Tang Kwor Ham & Ors v Pengurusan Danaharta Nasional Bhd & Ors* [2006] 5 MLJ 60; [2006] 1 CLJ 927 Gopal Sri Ram J stated:

> Applications for leave under O 53 are made and they must be made through a two stage process. The High Court should not go into the merits of the case at the leave stage. Its role is only to see if the application for leave is frivolous. If for example, the applicant is a busybody, or the application is made out of time or against a person or body that is immunized from being impleaded in legal proceedings then the High Court would be justified in refusing leave in limine. So too will the court be entitled to refuse leave if it is the case where the subject matter of the review is one which is settled by law (either written law or common law) is non-justiciable, eg proceedings in Parliament.

Consent under s 9 of the GPA

[14] The respondent in this case refused to grant consent under s 9 of the Government Proceedings Act 1956 to enable the association to be made a trustee in addition to or replace the current trustees. The judicial review being pursued initiated by this leave application is against the said refusal by the respondent to grant consent.

[15] The respondent now objects to the leave application by arguing as a preliminary objection that the applicant has not obtained consent from the respondent under s 9 of the Government Proceedings Act 1956. The court finds the basis of this objection to be perplexing as the leave for judicial review is against the very decision of the respondent in refusing consent.

[16] To refuse the consent and in the same breath to now say that consent is required before a leave for judicial review is sought is most definitely a misconceived and circular argument.

[17] It is very pertinent to be noted that the respondent has not filed any affidavit to oppose this leave application. This court finds this action or the lack of, is certainly most unfavourable to the respondent's position. In the case of *Teh Guat Hong v Perbadanan Tabung Pendidikan Tinggi Nasional* [2015] MLJU 213, Hamid Sultan JCA elaborated as follows:

> It is important to note that the AG Chambers has not filed any affidavit in reply and the submission of facts and law by the senior federal counsel on the facts of of the instant case ought to have been rejected by the High Court in limine.
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> As I said earlier the learned federal counsel was submitting from the bar on matters relating to facts without an affidavit in opposition to the leave application. In consequence, the court should have treated the leave application as one without any objection and if it is satisfied that it is not frivolous or vexatious or abuse of process of court, it should have allowed the leave for judicial review and considered the issues raised by the federal counsel upon proper affidavit in opposition filed by the

respondent and the case ought to have been heard on merits. A

[18] This court finds that the leave stage is not the rightful stage to have the merits of the issues to be determined and exhaustive arguments are considered as the leave stage is merely to sieve out frivolous applications before proceeding with the substantive stage of the proceedings. B

[19] The submission by the senior federal counsel that 'the decision of the AG belongs to the AG' is untenable. Upon an inspection of art 145(3) of the Federal Constitution of the Federal Constitution and produced herein: C

> The Attorney General shall have power, exercisable at his discretion, *to institute, conduct or discontinue any proceedings of an offence*, other than proceedings before a Syariah court, a native court or a court-martial.

[20] This court is of the considered opinion that the absolute discretion of the respondent (if at all it exists) is only pertaining to criminal offences whereas this case involves the discretion or authority of the respondent in a non prosecutorial role hence it should not involve an unfettered discretion. D

[21] The discretion exercised by the respondent should be exercised for a proper purpose and should not be exercised unreasonably and cannot be free from legal restraint. The court retains the liberty to intervene in appropriate instances depending on the facts of a particular case. E

Interest of the applicant F

[22] The applicant is bringing the action in his capacity as the secretary of the association. The association is a registered society under s 7 of the Societies Act 1966. This action is brought by the association and a society must institute an action in the name of its member who is the public officer of the society. The applicant being the secretary of the association is the public officer of the association. G

[23] This court finds that the use of the phrase 'any persons' under O 53 r 2(4) of the Rules of Court 2012 is limited not just to individuals but also to a class of persons. The members of the association are the class of persons adversely affected by the refusal of the respondent to give consent in this instance. H

[24] The affidavit in support of the application (encl 3) which is not accorded an affidavit in reply by the respondent to counter the averments made, has disclosed sufficient grounds for the merits of the application to be heard. I

Non-justiciable

[25] The senior federal counsel submits as a preliminary objection that the decision of the Attorney General on consent under s 9 of the Government Proceedings Act 1956 is a non-justiciable issue.

[26] In *Halsbury's Laws of Malaysia* (Vol 3(1), 2015 Reissue) the definition is as below:

> A justiciable issue. The subject matter of every judicial review is a decision made by some person. To qualify as a subject for a judicial review the decision must have consequences which affect some person or persons other than the decision maker, although it may affect him too.
>
> The courts will not accord protection to an interest not regarded as being entitled to legal recognition. Thus, they will not pronounce upon the merits of a dispute between parties on a question of professional ethics, or award a declaration as to an issue that is academic, hypothetical, premature or dead, or make any order in relation to matter excluded from their jurisdiction. The validity of an Act of Parliament may be questioned by the courts; as is the case in respect of delegated legislation.
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> Under the English law, many Crown prerogative power will not be reviewed by the courts on the grounds that they are not justiciable, such as the prerogative of entering into treaties, the defence of the realm, the granting of honours, the dissolution of Parliament and the appoitment of ministers. Matters of national security are non justiciable, provided there is some evidence that national security is at stake. Similarly, the courts will not review the exercise of the Attorney General's discretion in deciding whether to bring relator proceedings.

[27] The decision of Lord Wilberforce in the case of *Gouriet v Union of Post Office Workers and others* [1978] AC 435 at p 477 (Tab 13) decided on the issue of a relator action is and relied upon by the senior federal counsel:

> A relator action — a type of action which has existed from the earliest times-is one in which the Attorney-General, on the relation of individuals (who may include local authorities or companies) bring an action to assert a public right. It can properly be said to be a fundamental principle of English law that private rights can be asserted by individuals, but that public can only be asserted by the Attorney-General as representing the public. In terms of constitutional law, the rights of the public are vested in the Crown, and the Attorney-General has in general no power to interfere with the assertion of private rights, so in general no private person has the right of representing the public in the assertion of public rights. If he tries to do so his action can be struck out.
>
> An appeal was made to the Year Books to controvert this universally accepted proposition. Examples can be found of cases, in early times, where subjects were allowed to assert in the courts rights of the Crown (see *Year Book Series* Bo XVII, Ed II, 1314–15, Selden Society ed WC Bolland). But all these cases were cases

asserting, through writs of quo warranto or analogous writs, claims of a nature which in modern times came to be made by the prerogative writs, or cases concerned with some proprietary right of the Crown: No instance of this could be brought forward, whether in ancient or modern times. A

The plaintiff accepted that this was so but produced a number of arguments why this form of action should be departed from or modernised. The use of the Attorney-General's name was said to be fictional: the real claimant was the individual — who has to bear the costs. The introduction of the Attorney-General was a matters of practice and procedure, the subject of judicial invention: what the court have invented, the courts can change. The Attorney-General has no real part to play in these proceedings: his functions are limited to ensuring that the action is nor frivolous or vexatious. It is time to discard these fictions or at least to remould the action for use in modern times. B C

But the Attorney-General's role has never been fictional. His position in relator actions is the same as it is in actions brought without a relator (with the sole exeption that the relator is liable for costs: see *Attorney-General v Cockermouth Local Board* (1974) LR 18 Eq 172, per Jessel MR). He is entitled to see and approve the statement of claim and any amendment in the pleadings, he is entitled to be consulted on discovery, the suit cannot be compromised without his approval; if the relator dies, the suit does not abate. For the proposition that his only concern is to 'filter out' vexatious and frivolous proceedings, there is no authority — inded, there is no need for the Attorney-General to do what is well within the power of the court. On the contrary he has the right, and the duty, to consider the public interest generally and widely. D E

It was this consideration which led to the well known pronouncement of the Earl of Hasbury LC in 1902, for the suggestion was being made that the court could inquire whether, when the Attorney-General had consented to relator proceedings, the public had a material interest in the subject matter of the suit: F

> *… the initiation of the litigation, and the determination of the question whether it is a proper case for the Attorney-General to proceed in, is a matter entirely beyond the jurisdiction of this or any other court. It is a question which the law of this country has made to reside exclusively in the Attorney-General see London Country Council v Attorney-General* [1902] AC 165*, per Earl of Halsbury LC at p 169 and per Lord Macnaghten at p 170.* G

Accepting as I do that the Attorney-General's discretion is absolute and non-reviewable, there was accordingly, in my judgment, no basis upon which the plaintiff should have been granted the final injunction he sought. It remains to be considered whether he should have been granted any relief or whether, as the three defendants submit, the proceedings should have been dismissed as showing no reasonable cause of action. H I

London County Council v Attorney-General [1902] AC 165, 168, per Lord Halasbury LC. But if the court were to entertain an application for an injuction or a declaration in a matter of public interest, after the Attorney-General had refused his consent, it would be overulling his decision at least by implication,

A and if eventually it were to grant the application the overulling would be even plainer.

[28] This court finds this rigid reliance on the English Law on this area as submitted by the senior federal counsel to be ill conceived. Reference is made to the Court of Appeal case of *Teh Guat Hong v Perbadanan Tabung Pendidikan Tinggi Nasional* [2015] MLJU 213; [2015] MLJU 2268 wherein His Lordship Hamid Sultan JCA elaborated on the comparative analysis of English Law and Malaysian Law as thus:

> [16] The learned judge in that case had also dealt extensively with the concept of justiciability and came to the conclusion that on the facts the application did not merit leave to be granted. I do not propose to repeat the cases dealt in that case save to say:
>
> (i) the issue of justiciability takes a different stage, approach and jurispudence when contrasted with judicial decisions relating to Parliamentary Supremacy and Constitutional Supremacy; and
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> (ii) the English cases subscribing to the concept of Parliamentary Supremacy by the oath of office of an English judge has given great deference to the Act of Parliament as well as to some executive decision on the grounds of non-justiciability. In England, the courts cannot strike down an Act of Parliament and at the most it can only strike down a subsidiary legislation with exception related to European Union Law and its applicability in the UK. In cases of judicial review, the English courts have provided a restrictive meaning to the concept of justiciability, for example, the House of Lords in *CCSU v Minister for the Civil Service* [1984] 3 All ER 71 have stated:
>
> Generally, an issue is regarded as non-justiciable where a court of law or the court process is ill-suited to decide the issue by reason of lack of competence, unsuitability of the legal method, lack of satisfactory criteria for a judicial determination of the dispute at hand, or where constitutional, common or statutory laws expressly or contxctually insulate it from judicial determination.

His Lordship further elaborated as thus:

> (viii) The jurisprudential approach in the Public Law field in England and Malaysia is like the distinction between an apple and orange. The English approach takes a narrow view on justiciability favouring the Act of Parliament and where possible administrative action as stated by the House of Lords CCSU's case. The Malaysia position is much wider as briefly encapsulated in the Federal Court case of *Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 5 CLJ 865. The jurisprudence on justiciability on policy matters where the doctrine of Constitutional Supremacy applies is well articulated by the Indian Supreme Court in the *State of Rajasthan & Ors v Basant Nahata AIR* 2005 SC 3401, where it was stated:
>
> The contention raised to the effect that this court would not interfere with the policy must conform to the provisions of the constitutional mandates. Even

otherwise a policy decision can be subjected to judicial review (see *Cellular Operators Association of India and Ors v Union of India and Ors* MANU/SC/1368/2002; [2002] SUPP5SCR 222 and *Clariant International Ltd And Anr v Securities & Exchange Board of India* MANU/SC/0694/2004; AIR 2004 SC 4236).

[29] His Lordship then went on to conclude his judgment in the case as such:

(x) English cases cannot stand as precedent in the instant case for non-justiciability issued for reasons stated earlier. The court when confronted with a complaint of this nature is bound to hear it on merits and provide relief if it warrants so. The right to complain vests with the applicant but whether the relief will be granted is one which relates to the jurisprudence relating rule of law and the Federal Constitution.

(xi) It must be asserted that arbritrariness in any decision making process whether by executive or juciary is an affront to the Rule of Law and Federal Constitution. In *Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135, on the issue of complaint relating to arbitrariness, HRH Raja Azlan Shah (CJ Malaya as HRH then was) had anchored the jurisprudence for judicial review in immutable terms by asserting that 'unfettered discretion is a contradiction in terms, and every legal power must have limits, otherwise there is dictatorship. And the courts are the only defence of the liberty of the subject against departmental aggression'.

(xii) Based on the jurisprudential approach taken in *Pengarah Tanah dan Galian*'s case, every compaint of arbitrariness in decision making process of public body, if on the face of record is not frivolous, vexatious or abuse of process of court, need to be granted leave to proceed with the judicial review application on merit.

[17] For reasons stated above, I take the view the appeal must be allowed with no order as to costs. The judgment of the High Court is set aside. Leave for judicial review is granted and the application for judicial review is to be heard on its merits.

[30] His Lordship Varghese George JCA also in his judgment in the same case had this to say:

[3] On my part the court should take a flexible approach when dealing with a leave application under O 53 r 3. If the applicant can prima facie satisfy that he is a person affected by a decision of a quasi-judicial or administrative nature or made by a public body, the simple question that the court should ask is only this — *Why should leave not be granted?*

[4] The premise underlying this approach is that an aggrieved person in such circumstances has a right to seek the courts supervisory powers over decision makers and ought not to be shut out summarily. In other words the courts concern should

not be to exclude such a complaint at this leave stage to take a more permissible stance unless there are clear and obvious grounds to disallow the review applied for.

[31] This court concurs with the decisions made by our Court of Appeal that has distinguished our court's stance on the issue of non justiciable and rigid reliance on this issue on English law would be misconceived.

CONCLUSION

[32] The court in this instance finds that the test for leave for judicial review in this case has been satisfied. The application is not frivolous and the applicant has an arguable case. Therefore the threshold for leave to be granted has been satisfied and thus order for encl 1 is granted with further case management to be pursued before the senior assistant registrar.

Order for encl 1 granted with further case management to be pursued before the senior assistant registrar.

Reported by Nisha Paran